Supreme Court, U. S.
FILED
APR 7 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1532

VINCENT CHARLES MERCURI,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Opinion Below.

On March 9, 1979 the United States Court of Appeals for the First Circuit reported its opinion on the Petitioner's appeal from an order of the United States District Court for the District of Massachusetts (see Appendix A).

Jurisdiction.

This petition seeks a review of the March 9, 1979 judgment of the First Circuit which was entered consistent with said opinion (see Appendix B). The Supreme Court has jurisdiction to review the judgment, by means of a Writ of Certiorari, pursuant to Title 28 U.S.C. § 1254(1).

Question Presented for Review.

Whether the ten (10) day appeal period provided criminal defendants under the Federal Rules of Appellate Procedure Rule 4(b) violates the criminal defendant's rights to equal protection of the laws and/or due process of law under the Fifth Amendment to the United States Constitution.

Constitutional Provisions and Rules Involved.

This petition involves the provisions of Rule 4 of the Federal Rules of Appellate Procedure (F.R.A.P. 4, 28 U.S.C.) (see Appendix C) and the Fifth and Fourteenth Amendments to the Constitution of the United States (U.S.C. Const. amend. V and XIV, § 1, respectively) (see Appendix D, E).

Statement of the Case.

On March 24, 1978 the petitioner was sentenced by the United States District Court for the District of Massachusetts to a five (5) year term at the Federal Correctional Institution in Danbury, Connecticut, plus a special three (3) year parole term, for conspiracy to possess and distribute cocaine in violation of Title 21 U.S.C. § 841(a)(1) and § 846.

On July 10, 1978, after Mercuri began serving his sentence, his attorney filed with the Court a motion for reduction of sentence and a motion to vacate judgment, sentence, and to grant a new trial. On July 21, 1978 his counsel filed an amendment to his motion to vacate judgment, sentence, and to grant a new trial. The first two motions were denied by the Court on July 21, 1978; the amended motion was denied by the Court on August 1, 1978.

On August 28, 1978 Mercuri filed (a) notices of appeal relative to all three denials and (b) a motion to extend time for filing notices of appeal. The motion was denied by the Court on August 28, 1978. On September 6, 1978 Mercuri filed a notice of appeal relative to the denial of his motion to extend time for filing notices of appeal. On appeal to the First Circuit Court of Appeals Mercuri argued that: 1) he was entitled to an extension of time to appeal due to "excusable neglect" as provided by F.R.A.P. 4(b); and 2) that the ten (10) day appeal period provided by Rule 4(b) violates the criminal defendant's rights to equal protection of the laws and due process of law under the Fifth Amendment to the United States Constitution.

On appeal to the First Circuit of Appeals, and in his motion for extension of time to appeal, Mercuri had alleged that his attorney, Joseph E. Marino, Esq., of Winchester, Mass., was on vacation in Newfoundland from July 28, 1978 through August 6, 1978 and that Mr. Marino's office did not receive the District Court Clerk's notices of the July 21, 1978 and August 1, 1978 denials until sometime between July 31, 1978 and August 4, 1978. Thus Mercuri argued that notices of the July 21, 1978 denials were received, at the earliest, ten (10) days after the denial and on the last day on which said denials could be appealed as of right pursuant to F.R.A.P. 4(b). Mercuri also argued

in his motion that the ten (10) day appeal period provided criminal defendants by F.R.A.P. 4(b), especially when compared with F.R.A.P. 4(a) applicable to civil litigants, violated Mercuri's rights to due process and/or equal protection of the laws under the Fifth Amendment to the United States Constitution.

The United States Court of Appeals for the First Circuit determined that excusable neglect was not present and the Court saw no merit in Mercuri's constitutional attack of F.R.A.P. 4(b).

Argument.

Pursuant to F.R.A.P 4(a), civil litigants are granted thirty (30) days to appeal to the Court of Appeals from the entry of an order or judgment of a Federal District Court; if the United States or an officer or agency thereof is a party to such action, then all parties to such action have sixty (60) days to file an appeal.

Pursuant to F.R.A.P. 4(b), in a criminal action a defendant has ten (10) days to appeal from the entry of the judgment or order. The criminal defendant may motion for a maximum thirty (30) day extension of the appeal period, but the motion cannot and will not be granted unless the criminal defendant affirmatively shows "excusable neglect" in the prosecution of the appeal. Under said Rule the United States Government has a minimum thirty (30) day appeal period and in addition may also move for a thirty-day extension of the appeal period.

With respect to appellate rights in the Federal Courts, criminal defendants have been placed in a class with duties and burdens different from those resting upon the general public or the United States Government. In the instant case

Mercuri was imprisoned in Danbury, Connecticut over one hundred miles from his attorney's offices when the motions were denied. The ten(10) day appeal period provided by F.R.A.P. 4(b) commences on the date the judgment or order is entered and not when it is received by counsel for defendant; therefore each day the clerk's notice of denial remains with the U.S. Postal Service is a day that must be deducted from the appeal period.

Attorneys for criminal defendants such as Mercuri have a right and a duty to confer with their clients prior to filing an appeal. Matters to be considered by the defendant are costs, attorney's fees, and likelihood of success among other things. It is a bad practice to suggest or condone the filing of so-called "automatic" appeals. Even if counsel for Mercuri had filed notices of appeal when he returned from vacation sixteen (16) days after the July 21, 1978 denials, the District Court would not have jurisdiction to grant an extension of time unless Mercuri filed a motion to extend and showed excusable neglect. Note that Mercuri's notices of appeal and his motion to extend the time for appeal were all filed within forty (40) days of the July 21, 1978 denials, which period is the maximum allowed a criminal defendant by F.R.A.P. 4(b).

The First Circuit Court of Appeals, in its opinion, made no mention of Mercuri's comparison between the appeal provisions of F.R.A.P. 4(a) concerning civil litigants and F.R.A.P. 4(b) concerning criminal defendants. Mercuri suggests that such a separate classification with respect to criminal defendants is discriminatory, arbitrary, unreasonable, unfair, unjustified and has the effect of severely limiting the criminal defendant's right to due process. The Court of Appeals did state that the reason for the disparity as to appeal rights concerning the United States Government and criminal defendants is because: "A criminal

defendant has an absolute right of appeal; the government's appeal is limited by statute to specific situations. 18 U.S.C. § 3731. It is neither unfair nor unconstitutional to give the United States thirty days to decide whether there are statutory grounds for an appeal and, if so, whether an appeal should be taken" (Appendix A).

Actually, in the absence of a statute, no one has a constitutional right to appellate review. *Sierra Melendez* v. *Rivera Brenes*, 331 F. Supp. 898 (D. P. R. 1971); *Richards* v. *Townsend*, 303 F. Supp. 793 (D. Cal. 1969), modified on other grounds 444 F.2d 528 (9th Cir. 1971). Therefore the defendant as well as the government must become aware of the statutory provisions governing appeal. Additionally, the Office of the United States District Attorney is constantly handling criminal matters in Federal Courts whereas most attorneys for criminal defendants are unlikely to be specializing in such cases. If anyone is familiar with Federal Court Rules and criminal statutes it is the office of the United States Attorney.

The Fifth Amendment to the Constitution does include an equal protection principle. *In re Smith*, 323 F. Supp. 1082 (D. Colo. 1971); *Shapiro* v. *Thompson*, 394 U.S. 618, 641-642, 89 S. Ct. 1322 (1969). The Constitution requires that, when provided, appeals must comport with principles of due process and equal protection. *Dorrough* v. *Estelle*, 497 F.2d 1007 (5th Cir. 1974), reversed on other grounds 420 U.S. 534, 95 S. Ct. 1173 (1975), rehearing denied 421 U.S. 921, 95 S. Ct. 1589, on remand 512 F.2d 1061 (5th Cir. 1975).

Although minor differences in the application of laws to different groups do not violate the Constitution, Mercuri suggests that the difference in rights granted parties by F.R.A.P. 4 are not minor. If a civil litigant fails to prosecute an appeal, he has most likely lost money. But if a

criminal defendant has failed to prosecute an appeal, he has most likely lost his freedom.

Conclusion.

The petitioner believes that the foregoing matters present an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States of America. It is therefore submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

VINCENT CHARLES MERCURI,
PETITIONER,

By His Attorney,

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Appendix A.

NOT FOR PUBLICATION

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 78-1441

UNITED STATES OF AMERICA,
APPELLEE,
v.
VINCENT CHARLES MERCURI,
DEFENDANT-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Frank H. Freedman, *U.S. District Judge*]

Before Coffin, *Chief Judge*,
Campbell and Bownes, *Circuit Judges*.

Joseph E. Marino, for appellant.
Walter B. Prince, Assistant United States Attorney, with whom *Edward F. Harrington*, United States Attorney, was on brief, for appellee.

March 9, 1979

Per Curiam. There are two issues in this case: one, whether the district court abused its discretion in determining that the failure to file an appeal on time was due to excusable neglect[1] and, two, whether the provisions of Fed.R.App.P. 4(b) limiting a criminal defendant to ten days for filing a notice of appeal while allowing the government thirty days violates the defendant's rights to equal protection of the law and due process under the Constitution of the United States.

Appellant had been indicted on three counts for alleged violations of federal narcotic laws. After pleading guilty to one count of conspiracy, the other counts were dismissed. Appellant was sentenced to a term of five years on March 24, 1978, which he is currently serving at the Federal Penitentiary in Danbury, Connecticut. On July 10, 1978, appellant moved for reduction of sentence, which was denied on July 21. Appellant, on July 20, moved to amend his motion for reduction of sentence on the grounds that the presentence report incorrectly stated that 27.4 grams of cocaine were found on the appellant, whereas the correct amount was 1.83 grams. In denying this motion on August 1, the district court stated: "Defendant's culpability in the instant case and the two previous federal convictions resulted in the sentence. Error in the amount of grams did not prejudice the Court against the defendant."

Appellant failed to appeal the denial of his motion within the ten day period prescribed by Fed.R.App.P. 4(b). On

[1] Fed.R.App.P. 4(b) provides in pertinent part: "In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. . . . Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision."

August 28, he filed a motion to extend time for filing notices of appeal, which was denied on the same day by the district court.

The excusable neglect appellant relied on was the fact that his counsel was on vacation in Newfoundland from July 28 through August 6. It is also alleged that the notices of the denials of July 21 and August 1 were not received in the offices of appellant's attorney until sometime between July 31 and August 4. The only excuse advanced by appellant's counsel for not filing a notice of appeal immediately on his return from his vacation was that he did not have an opportunity prior to August 28 to consult with his client in the Federal Prison at Danbury, Connecticut. When asked at oral argument why a protective appeal was not filed, appellant's counsel again asserted his inability to consult with his client, which is not even a poor excuse.

We take judicial notice of the fact that notices of appeal, especially in criminal cases, are usually filed so routinely as to be automatic. As we noted in *Pinero Schroeder* v. *Federal National Mortgage Association,* 574 F.2d 1117, 1118 (1st Cir. 1978), "Filing a notice of appeal does not require much time or deliberation." While vacations are helpful and may even be necessary for busy lawyers, they do not toll the time requirements of the Federal Rules of Appellate Procedure. *See Airline Pilots* v. *Executive Airlines, Inc.,* 569 F.2d 1174 (1st Cir. 1978) and cases cited therein, for our view of what does and does not constitute excusable neglect. The neglect exhibited here was not excusable, in fact it was inexcusable.

We see no merit at all in appellant's constitutional attack on the disparate time requirements of the rule and no cases have been cited to us suggesting otherwise. The reason for the difference in the time requirements is obvious. A criminal defendant has an absolute right of appeal;

the government's appeal is limited by statute to specific situations. 18 U.S.C. § 3731. It is neither unfair nor unconstitutional to give the United States thirty days to decide whether there are statutory grounds for an appeal and, if so, whetner an appeal should be taken.

Affirmed.

Appendix B.

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 78-1441.

UNITED STATES OF AMERICA,
APPELLEE,

v.

VINCENT CHARLES MERCURI,
DEFENDANT, APPELLANT.

JUDGMENT

Entered March 9, 1979

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:

/s/ Dana H. Gallup
Clerk.

[cc: Messrs. Marino and Prince.]

Appendix C.

FEDERAL RULES OF APPELLATE PROCEDURE.

Rule 4. Appeal as of Right—When Taken

(a) Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

(b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

Appendix D.

United States Constitution, Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix E.

United States Constitution, Fourteenth Amendment.

[in Relevant Part]

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.